IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 7, 2006 Session

SHARON R. FLEENOR, DBA FLEENOR FAMILY PROPERTIES v. AMERICAN TITLE COMPANY, INC.

Appeal from the Law Court for Sullivan County
No. C12373 (M) John S. McLellan, III, Judge

No. E2005-01029-COA-R3-CV - FILED JULY 25, 2006

This action finds its genesis in an ultimately-rescinded mortgage loan agreement between two non-parties to this litigation, Ameriquest Mortgage Company ("the Mortgage Company") and Tyler Britt ("the Judgment Debtor"). The sole defendant, American Title Company, Inc. ("the Closing Agent"), was the closing agent for the loan made by the Mortgage Company to the Judgment Debtor. The Closing Agent was directed to issue checks from the loan proceeds to various creditors of the Judgment Debtor. The plaintiff, Sharon R. Fleenor, doing business as Fleenor Family Properties, was one of those creditors; she was the holder of a judgment against the Judgment Debtor. The Closing Agent issued a check for the purpose of satisfying the judgment and the check was deposited in the trust account of Fleenor's attorney. At about the same time, the Judgment Debtor and the Mortgage Company agreed to rescind the loan agreement. The Closing Agent immediately issued a stop payment order on Fleenor's check; the order "caught" the check before it cleared the Closing Agent's bank. Fleenor filed this action against the Closing Agent for "breach of warranty by a maker to a holder in due course." The Sullivan County General Sessions Court awarded Fleenor a judgment in the amount of the previously-issued check plus prejudgment interest. The Closing Agent appealed to the trial court, which held in favor of the Closing Agent and dismissed Fleenor's complaint. From this judgment, she appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

J. Wesley Edens, Bristol, Tennessee, for the appellant, Sharon R. Fleenor, dba Fleenor Family Properties.

Gary L. Edwards, Johnson City, Tennessee, for the appellee, American Title Company, Inc.

OPINION

I.

The Judgment Debtor and his wife, Tori Britt, operated a business known as TNT Tanning located in Johnson City. They leased their location from Fleenor. In April, 2004, Fleenor sued the Judgment Debtor and his wife for past due rent and for possession of the property. The Washington County General Sessions Court entered an agreed judgment for Fleenor in the amount of $7,839.38; it also awarded Fleenor possession of the subject property. Shortly thereafter, the Judgment Debtor entered into an agreement with the Mortgage Company to borrow $94,500. A substantial portion of the proceeds from the loan was to be used to satisfy debts due the Judgment Debtor's creditors, including Fleenor. Sometime prior to the closing of the loan, a representative from the Mortgage Company contacted Fleenor's attorney, J. Wesley Edens, to determine the amount Fleenor would require to release the lien of her judgment. Edens later informed the Mortgage Company's representative that the judgment would be satisfied and the lien released in exchange for a payment of $12,894.[1]

On May 28, 2004, Edens received a fax from the Mortgage Company indicating that it intended to have a check issued in the amount of $12,894 payable to the trust account of Edens' law firm. The fax advised that the check would arrive by June 8, 2004. This was the last direct communication between the Mortgage Company and Edens.

The Mortgage Company's loan to the Judgment Debtor was closed on or about May 28, 2004.[2]

Sean Kaufman was employed by the Closing Agent. On June 30, 2004, Kaufman received a fax from Edens confirming that Edens would prepare a satisfaction and release of the judgment

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[1] A document was presented at trial to substantiate this amount. The document reflects the following:

March Rent	$ 3,018.75
Interest 82 days @ $0.83 *per diem*	68.06
April Rent	3,018.75
Interest 41 days @ $0.83 *per diem*	34.03
May Rent	3,018.75
Interest 21 days @ $0.83 *per diem*	17.43
June Rent	3,018.75
Utilities	24.70
Returned Check Fees	6.00
Attorney's Fees	500.00
Court Costs and Process Fees	168.50
Total	$12,893.72

[2] The exact date of the loan's closing cannot be ascertained from the record. However, the parties appear to agree that the closing occurred either on May 28, 2004 or June 5, 2004.

against the Judgment Debtor and his wife upon receipt of a payment of $12,894. Edens' law firm received a check from the Closing Agent for the specified amount on July 7, 2004, and deposited the check in its trust account. Either that same day or very soon thereafter, the Judgment Debtor and the Mortgage Company rescinded their loan agreement.[3] The Mortgage Company subsequently notified the Closing Agent to stop disbursing the loan proceeds. The Closing Agent then issued the stop payment order on the check that had been sent to Edens' law firm.

In October, 2004, Fleenor brought this action against the Closing Agent in the Sullivan County General Sessions Court, alleging "breach of warranty by a maker to a holder in due course, in the amount of $12,894.00 with pre-judgment interest …." The general sessions court entered judgment in favor of Fleenor. The Closing Agent appealed to the trial court. The Closing Agent then filed a pleading entitled "Defendant's Disclosure of Defenses" which provides, in pertinent part, as follows:

> As its defenses to [Fleenor's] suit, [the Closing Agent] relies upon any and all defenses available to it at law and/or in equity, including but not limited to all defenses provided in *T.C.A.* § 47-3-101, *et seq.* (*i.e., T.C.A.* § 47-3-117 regarding other agreements affecting instrument, and § 47-3-305 regarding defenses and claims in recoupment), lack/failure of consideration, no damage to [Fleenor] (i.e., [Fleenor] still has her judgment lien against … [the Judgment Debtor] as the same was never released by [Fleenor]), estoppel, illegality, nullity, and [Fleenor's] action is not in good faith as it does not comport with commercial standards and fair dealing.…

A trial was held in January, 2005. Fleenor, Edens, and Kaufman each testified regarding the transactions at issue. Most notably, the Closing Agent's Kaufman testified as follows:

> Q. [D]oes American Title Company have any say with regards to whether or not a loan is rescinded or not rescinded?
>
> A. No.
>
> Q. Okay, who has those rights?
>
> A. The customer and the lender.

[3] Pursuant to the provisions of 15 U.S.C. § 1635(a) (1998), a borrower has the right of rescission within three business days of the consummation of the loan. The Mortgage Company, however, allows for a rescission period of seven calendar days. Since the loan closed on either May 28 or June 5, 2004, and the rescission occurred around July 7, 2004, the rescission took place well after both of these rescission periods had expired. The reason for the rescission is not addressed in the record.

* * *

> Q. Okay, Mr. Kaufman, with regards to the standard in the industry with regards to when a loan is rescinded, what are the obligations and responsibilities, if any, of the settlement an[d] escrow agent who's handling that loan?
>
> A. Our responsibilities are to return the funds and to basically kill the deal.
>
> Q. Okay. And with regards to the loan at issue in this case, … was that loan rescinded?
>
> A. Yes. . . .
>
> Q. Okay. And tell us what American Title Company did at that point once the loan was rescinded?
>
> A. We issued stop pays on the checks that have already gone out that had not gone through and posted and cleared yet. And then we returned the entire wire amount to the lender.
>
> * * *
>
> Q. Mr. Kaufman, is it standard in the industry that when a loan is rescinded that the settlement and escrow agent stops payment on all checks that are issued stemming from that loan?
>
> A. Yes.

On cross-examination, Kaufman stated the following:

> Q. Okay. And as part of your job in the standard of the industry, you're not supposed to stop payment on checks that the right of rescission has passed, correct?
>
> A. It's been my understanding that if the lender contacts you and says the customer doesn't want the deal, they don't want the deal, give us our money back, then you are required to do so.

When describing a conversation he had with Edens, Kaufman testified that he and Edens discussed the fact that there was to be an underlying mortgage loan agreement. Kaufman added that

> [o]f course, [Edens] knows that this is all contingent upon [the Mortgage Company] and that this is a loan disbursement. We're not actually out of the goodness of our hearts settling a debt for [the Judgment Debtor].

By order dated March 18, 2005, the trial court recited its opinion which included the following findings and conclusions:

> The . . . loan's rescission rights exist solely between lender and customer and [the Closing Agent] has no authority to void the loan agreement nor to act in contravention of [the Mortgage Company's] directive to void the closing and return loan proceeds.
>
> The evidence is undisputed that the standard in the industry with regard to the obligation of the closing agent when the loan process is terminated is to return the loan proceeds to the lender and to take whatever action is necessary to void its actions with regard to the transaction. [Fleenor] did not deal with [the Mortgage Company] such that [Fleenor's] involvement in the loan process was through her attorney who was negotiating with [the Closing Agent] and who had no direct dealings with the lender. . . .
>
> [Fleenor] gave an executory promise and prior to delivery of the release and satisfaction of judgment to [the Closing Agent], [the Closing Agent] issued a stop payment on its check which was deposited into [Fleenor's] counsel's escrow account. Due to [the Closing Agent] not funding its check, [Fleenor] can revoke her executory promise and not suffer damage incident to [Fleenor's] judgment lien. . . .
>
> Under the facts existing between the parties in this case, the holder in due course doctrine is irrelevant in determining the rights between [the Closing Agent] and [Fleenor]. . . . [The Judgment Debtor and the Mortgage Company] nullified the loan agreement which was to fund the check sent to [Fleenor's] counsel by [the Closing Agent] thereby nullifying [the Closing Agent's] obligation to fund its closing check.
>
> [The Closing Agent] should not be burdened with the liability that may ensue as liability from voiding the loan relied upon by [Fleenor] may stem from either the principal or its obligor who are not parties to this litigation.

Based on the foregoing, the trial court dismissed Fleenor's suit against the Closing Agent. From this judgment, Fleenor appeals.

II.

Fleenor's issues present the following three questions for our review:

> 1. Did the trial court err in failing to decide whether Fleenor was a holder in due course?
>
> 2. Did the trial court err in holding that Fleenor's status, be it as a holder or as a holder in due course, was immaterial?
>
> 3. Does the evidence preponderate against the trial court's factual findings that the standard for closing agents is to return loan proceeds to the lender and to void all of its actions with regard to the loan transaction when the loan is voided by the lender and the borrower?

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us burdened with a presumption of correctness as to the trial court's factual determinations – a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996). In applying our standard of review, we are mindful of the well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991).

IV.

A.

Fleenor's first two issues are related. In support of these issues, Fleenor claims that she was a holder in due course and that the trial court committed error when it concluded that Fleenor's status as such was, in the trial court's word, "irrelevant." Fleenor argues that she is entitled to enforce the check issued by the Closing Agent without regard to the latter's asserted defenses or claims.

The Tennessee version of the Uniform Commercial Code defines a "person entitled to enforce" an instrument to include "the holder of the instrument." Tenn. Code Ann. § 47-3-301

(2001). The parties do not dispute that Fleenor, as the payee in possession of the check,[4] qualifies as a "holder." Fleenor argues that she is more than a simple holder – she asserts that she is a holder in due course and that this fact shields her from the defenses and claims being asserted by the Closing Agent.

In the instant case, Fleenor, as the payee (through her agent, Edens) of the check seeks to enforce the obligation represented by the check against the maker of the check, *i.e.*, the Closing Agent. It is Fleenor's theory – as pursued in the trial court and as now asserted on this appeal – that the Closing Agent, in issuing the check for $12,894, undertook its *own* contractual obligation to pay Fleenor the amount of the check once the Mortgage Company's seven-day rescission period had expired. Fleenor does not contend that either the Mortgage Company or the Judgment Debtor was contractually obligated to her as a result of the aborted loan agreement. On the contrary, Fleenor argues in her brief that the "payor and payee transaction of Fleenor and [the Closing Agent] was separate and apart from the lender and borrower transaction of [the Mortgage Company and the Judgment Debtor] and their concurrent relationship with [the Closing Agent]." Interestingly enough, the Closing Agent *also* focuses on its relationship with Fleenor. It asserts defenses and claims arising out of that relationship and argues that those defenses and claims are only against Fleenor and not ones against either the Mortgage Company or the Judgment Debtor. Thus, the very nature of Fleenor's complaint and the Closing Agent's theory of defense involves nothing more than a two-party transaction. We are simply dealing with a claim for enforcement by the payee of a check, *i.e.* Fleenor, against the payor of that check, *i.e.* the Closing Agent, and the latter's defenses and claims against the payee's action.

B.

Subject to certain exceptions not applicable here, a holder of an instrument becomes a holder in due course if:

> (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in § 47-3-

[4] Admittedly, Fleenor did not, herself, have physical possession of the check. At the time the stop payment order was issued, the check was being held in Edens' trust account. However, Fleenor was in possession of the check in the sense that her attorney was holding it for her.

306, and (vi) without notice that any party has a defense or claim in recoupment described in § 47-3-305(a).

Tenn. Code Ann. § 47-3-302(a)(1)-(2) (2001). The "right to enforce the obligation of a party to pay an instrument" is addressed in Tenn. Code Ann. § 47-3-305 (2001) which provides, in pertinent part, as follows:

> (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> (1) a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;
>
> (2) a defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and
>
> (3) a claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.
>
> (b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) *against a person other than the holder*.

Tenn. Code Ann. § 47-3-305(a), (b) (2001) (emphasis added). Subsection (a)(1) lists the so-called "real defenses" that an obligor may assert against *any* person entitled to enforce an instrument, including a holder in due course. ***Id.***, at cmt. 1. Pursuant to subsection (b), subsections (a)(2) and (a)(3) state that other defenses or claims asserted by the obligor "against a person other than the holder" cannot be asserted against a holder in due course. ***Id.***, at cmt. 2.

Comment 4 to Tenn. Code Ann. § 47-3-302 provides that while a payee of an instrument, under certain circumstances, can be a holder in due course, that "is not the normal situation." Comment 4 further recites as follows:

> The holder-in-due-course doctrine assumes the following case as typical. Obligor issues a note or check to Obligee. Obligor is the maker of the note or drawer of the check. Obligee is the payee. Obligor has some defense to Obligor's obligation to pay the instrument. For example, Obligor issued the instrument for goods that Obligee promised to deliver. Obligee never delivered the goods. The failure of Obligee to deliver the goods is a defense. Section 3-303(b). Although Obligor has a defense against Obligee, *if the instrument is negotiated to Holder* and the requirements of subsection (a) are met, Holder may enforce the instrument against Obligor free of the defense. Section 3-305(b). *In the typical case the holder in due course is not the payee of the instrument. Rather, the holder in due course is an immediate or remote transferee of the payee.* If Obligor in our example is the only obligor on the check or note, the holder-in-due-course doctrine is irrelevant in determining rights between Obligor and Obligee with respect to the instrument.
>
> But in a small percentage of cases it is appropriate to allow the payee of an instrument to assert rights as a holder in due course. The cases are like those referred to in the quotation from Professor Britton referred to above, or other cases *in which conduct of some third party is the basis of the defense of the issuer of the instrument*.

Tenn. Code Ann. § 47-3-302 cmt. 4 (2001) (emphasis added). Comment 4 then goes on to provide four examples of when a payee can be deemed to be a holder in due course. One of the examples is as follows:

> Case #2. X fraudulently induces Y to join X in a spurious venture to purchase a business. The purchase is to be financed by a bank loan for part of the price. Bank lends money to X and Y by deposit in a joint account of X and Y who sign a note payable to Bank for the amount of the loan. X then withdraws the money from the joint account and absconds. Bank acted in good faith and without notice of the fraud of X against Y. Bank is payee of the note executed by Y, but its right to enforce the note against Y should not be affected by the fact that Y was induced to execute the note by the fraud of X. Bank can be a holder in due course that takes free of the defense of Y. Case #2 is similar to Case #1. In each case the payee of the instrument has given value to the person committing the fraud in

> exchange for the obligation of the person against whom the fraud was committed. In each case the payee was not party to the fraud and had no notice of it.

C.

Comment 4 makes it clear that the protected status of a holder in due course does not apply in the typical situation involving only a two-party transaction and a claim by the payee against the payor. However, the holder in due course doctrine would have come into play in the instant case had Fleenor negotiated the check to a third party who otherwise met the requirements for holder in due course status. But in that case the holder in due course would have been the third party, not Fleenor. Likewise, those "small percentage of cases," where a payee is considered a holder in due course, involve situations "in which the conduct of some third party is the basis of the defense of the issuer of the instrument." Since Fleenor's claim involves only the conduct of the Closing Agent – conduct which Fleenor claims gave rise to the contractual obligation to pay – there is no conduct of a third party such that Fleenor's claim could be considered one of those few cases where the payee is entitled to the rights of a holder in due course. *As to the defenses and claims of the Closing Agent,* "it is [not] appropriate to allow the payee of an instrument to assert rights as a holder in due course." *See* Tenn. Code Ann. § 47-3-302 cmt. 4. The Closing Agent's defenses and claims in this case are those it enjoys against Fleenor, not against some other individual or entity.

The trial court did not believe it was necessary to determine whether Fleenor is a holder in due course because, in the trial court's opinion, even if Fleenor is entitled to the rights of that status, she is still subject to the defenses and claims being asserted by the Closing Agent. This is another way of saying what we have said in the preceding paragraph of this opinion. As previously noted, Tenn. Code Ann. § 47-3-305(b) provides that the "right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) *against a person other than the holder*." (Emphasis added). In 2 White & Summers, *Uniform Commercial Code* § 17-8 (4th ed. 1995), the authors succinctly stated the applicable concept:

> We think that the prepositional phrase at the end of revised 3-305(b) means that a typical drawer of a check can always assert its defenses against its own payee – even if the payee is technically a holder in due course – because a holder in due course takes free only of claims and defenses "against a person other than the holder" (i.e. against someone other than *me*). In the classic two-party case the defense will be by the drawer or maker against the payee. When the payee sues, the drawer asserts the defense against the *payee* holder, not against a person "other than" the payee holder.

(Emphasis in original). In the instant case, the defenses and claims being asserted by the Closing Agent against Fleenor are defenses and claims that the Closing Agent has against Fleenor and not ones "against a person other than the holder." *See* Tenn. Code Ann. § 47-3-305(b). Hence, it is totally immaterial whether Fleenor is a holder in due course or not. Even if she satisfies the requirements for such status, she is subject to the Closing Agent's defenses and claims, assuming, of course, that those defenses and claims are legally valid and shown by a preponderance of the evidence.

D.

Fleenor's third and final issue is premised upon her claim that the facts preponderate against the trial court's finding – in its words – "that the [undisputed] standard in the industry with regard to the obligation of the closing agent when the loan process is terminated is to return the loan proceeds to the lender and to take whatever action is necessary to void its actions with regard to the transaction." As set forth previously, Kaufman testified that when a loan is rescinded, the industry standard for a closing agent is to "basically kill the deal" and return all funds to the mortgage company. Fleenor's challenge to the claimed industry standard comes from Kaufman's later testimony wherein he stated that normally checks will not be issued until after the time to rescind as of right has passed. Kaufman added, however, that under "unique circumstances" a loan would be rescinded after the time to do so as of right had passed. Kaufman then explained that it was not the industry standard to allow rescission after the time to rescind as of right had passed, but that, on occasion, it did happen. It is this testimony which Fleenor claims preponderates against the trial court's findings. We disagree. This particular testimony of Kaufman speaks to the industry standard for *mortgage companies* and when those companies typically allow loans to be rescinded and when they do not. It does not speak to the industry standard for *closing agents* when those "unique circumstances," *i.e.*, a rescission of a loan after the time for doing so has expired, are presented. This testimony does not negate Kaufman's previous testimony to the effect that when a loan is rescinded, the industry standard for the closing agent is to "kill the deal" and return all of the funds to the mortgage company. Since the Mortgage Company is not a party to this lawsuit, it is of no consequence that the company may have violated industry standards when it allowed the Judgment Debtor to rescind the deal after the time to do so as of right had passed.[5] In the case before us, we are only concerned with whether the Closing Agent violated its industry standard. Given that Kaufman's testimony as to the industry standard *for closing agents* when a loan is rescinded was not refuted, we conclude that the facts do not preponderate against the trial court's findings of fact on this matter.

E.

Fleenor does not *directly* challenge the trial court's factual findings/ultimate conclusion (1) that any agreement between the Closing Agent and Fleenor was conditioned upon the mortgage loan

[5] This should not be interpreted as any sort of a finding on whether the Mortgage Company actually did violate industry standards or whether such an alleged violation would give rise to a cause of action under the facts of this case.

not being rescinded, (2) that it was rescinded, and (3) that the Closing Agent therefore was not obligated to pay the $12,984. This being the case, we are not required to address these findings and conclusion. *See* Tenn. R. App. P. 13(b). However, because Fleenor's position in this case seems to tacitly question the trial court's basic rationale for its judgment, we deem it appropriate to address the trial court's reasoning.

In ***Strickland v. City of Lawrenceburg***, 611 S.W.2d 832 (Tenn. Ct. App. 1980), we observed that a "condition precedent in the law of contracts may be a condition which must be performed before the agreement of the parties shall become a binding contract or it may be a condition which must be fulfilled before the duty to perform an existing contract arises. 17A C.J.S. *Contracts* § 338." ***Strickland***, 611 S.W.2d at 837 (emphasis added). No liability arises under such a contract until such time as the condition precedent is fulfilled. ***Id***. *See also* ***Dick Moore, Inc. v. Greentree Financial Corp.***, No. 02A01-9707-CV-00148, 1998 WL 802008 (Tenn. Ct. App. Nov. 18, 1998), *no appl. perm. appeal filed*.

In the instant case, the trial court was concerned about the relative equities between the parties when it made its ruling. In particular, the trial court was troubled by Fleenor's request that it require the Closing Agent to pay the debt of the Judgment Debtor when: (1) the Closing Agent had no control over whether the loan was rescinded; and (2) the Closing Agent was required by its understanding with the Mortgage Company to return all of the funds when the loan was rescinded, regardless of whether the loan was rescinded during the Mortgage Company's seven-day period of rescission or later.

This Court recently discussed the concept of a claim for money had and received when we stated:

> With respect to the claim of money had and received, such an action "may be maintained where one receives money or its equivalent under such circumstances that in equity and good conscience he ought not to retain and in justice and fairness it belongs to another." ***Steelman v. Ford Motor Credit Co.***, 911 S.W.2d 720, 724 (Tenn. Ct. App. 1995)(citing ***Interstate Life & Accident Co. v. Cook***, 19 Tenn. App. 290, 86 S.W.2d 887, 891 (1935)).

Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc., 160 S.W.3d 874, 882 (Tenn. Ct. App. 2004). *See also* 66 Am.Jur.2d *Restitution and Implied Contracts* § 134 (2001) (noting that a claim for money had and received is proper under the "firmly established general rule that money paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, which would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund and that restitution is the proper remedy"). When the Closing Agent issued the check to Fleenor, both parties were operating under a mistake of fact, *i.e.*, that the mortgage loan was a *fait accompli.*

Although money had and received is typically asserted as a cause of action, as opposed to a defense, there is no logical reason why it cannot be asserted as a defense when, as in the present case, enforcement of a claim would be unjust and unfair given the fact that the parties were operating under a mutual mistake of fact. We hold that the Closing Agent had a legal defense against Fleenor's claim for enforcement of the check and that the evidence does not preponderate against the factual predicate underlying that defense.

V.

The judgment of the trial court is affirmed. This cause is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Sharon R. Fleenor dba Fleenor Family Properties, and her surety.

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CHARLES D. SUSANO, JR., JUDGE